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83-1316

NO.

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF FLORIDA,

Petitioner,

vs.

ARTHUR HAYES BURWICK,

Respondent.

On Petition for a Writ of Certiorari

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

DOES THE EXERCISE OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND TO HAVE THE ASSISTANCE OF COUNSEL PURSUANT TO MIRANDA V. ARIZONA, 384 U.S. 436 (1966), CLOSELY CONNECTED IN TIME TO THE OFFENSE, BEAR A SUFFICIENT RELATIONSHIP TO THE ISSUE OF SANITY AT THE TIME OF THE OFFENSE TO OVERCOME ANY NEGATIVE INFERENCES WHICH MIGHT BE DRAWN BY A JURY AND PERMIT THE ADMISSION OF THE DEFENDANT'S ELECTION ON REBUTTAL TO REFUTE AN INSANITY DEFENSE?

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at State v. Burwick, ___ So.2d ___ (Fla. 1983) 1983 FLW 480.[1] The opinion of the First District Court of Appeal of Florida is reported at Burwick v. State, 408 So.2d 722 (Fla. 1st DCA 1982).

The opinion of the Second District Court of Florida in Greenfield v. State, reported at 337 So.2d 1321 (Fla. 2d DCA 1976) was the basis upon which petitioner sought review by the Florida Supreme Court of the decision in Burwick v. State, supra and was specifically repudiated by the Florida Supreme Court in State v. Burwick, supra.

[1]The symbol "A" designates the pagination in the State's appendix.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to the specific provision of Rule 17.1 (b) of the Rules of the Supreme Court and Amendments V and and XIV of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V of the Constitution of the United States provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a capital Grand Jury, exception in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation."

Amendment XIV of the Constitution of the United States provides inter alia, that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Article I, Section 9 of the Constitution of Florida (1968) provides that:

"No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself."

STATEMENT OF THE CASE

This is a petition for certiorari from the opinion of the Florida Supreme Court, in which the Court decided a federal question, specifically whether the State may introduce evidence of a defendant's Fifth Amendment post-arrest conduct, including silence and a request to see an attorney after receiving Miranda warnings, as it relates solely to the issue of mental condition near the time of the offense when the defendant has asserted an insanity defense and the evidence is presented by the State in rebuttal. Pre-trial Burwick filed a Notice of Intent to Rely upon a defense of insanity. Prior to the taking of testimony at trial, the prosecutor notified the trial court that he intended to elicit testimony from the arresting

officers that Burwick had stated that he did not have anything to say in response to questioning which followed the giving of his Miranda warnings and had elected to have the presence of counsel present upon questioning. The State trial court instructed the prosecutor not to use the testimony in the State's case-in-chief but overruled Burwick's counsel's objection to the admission of evidence of the exercise of his constitutional rights during the prosecutor's rebuttal.

The First District Court of Appeal in Burwick v. State, 408 So.2d 722 (Fla. 1st DCA 1982) reversed and remanded on direct appeal concluding that:

> Burwick contends that the trial judge committed reversible error by admitting testimony by two policemen who stated they had asked him shortly after the arrest "if he would like to make a statement. . .

> and he said he did not." And that a police interview had ended 'when the defendant said that he wanted to talk to a lawyer.' We agree."
>
> 408 So.2d at 723.

Distinguishing the decision in Greenfield v. State, 337 So.2d 1021 (Fla. 2d DCA 1976), the Court also rejected the applicability of Harris v. New York, 401 U.S. 222 (1971) to the Burwick case.

The Florida Supreme Court in State v. Burwick, relying specifically on United States v. Hale, 422 U.S. 171 (1975); Doyle v. Ohio, 426 U.S. 610 (1976) and Miranda v. Arizona, 384 U.S. 436 (1966), held:

> "With equal dissatisfaction we reflect upon the constitutional infirmities which plagued the Greenfield decision. Burwick was arrested, informed that he had a right to remain silent, that anything he said might be used against him, and that he had a right to an

attorney if he so desired. See Miranda v. Arizona. Above all, he was implicitly assured that he would not be penalized if he should chose to exercise these Miranda rights. Doyle v. Ohio. The decision in Greenfield capriciously disavowed those governmental assurances contained within the Miranda warning and permit the State to go back on its word. It is fundamentally unfair for the State to lure Burwick into remain silent then impeach the man with this very same silence. To permit the State to benefit from the fruits of its own deceptions violates the due process clause for the Fourteenth Amendment and Article I, Section 9, of the Florida Constitution. (cites omitted)."

(App. 16-17).

The facts germane to the issue before this court are recited in detail in the Florida Supreme Court's opinion in State v. Burwick, supra. Excerpts from the facts as set out in State v. Burwick, reflect:

"On the morning of May 29, 1980, the victim called the sheriff's office to report that a man had broken into her home and had sexually assaulted her. Officer Logan of the Jacksonville sheriff's

department had answered the call. The victim told Officer Logan that her attacker was Burwick, whom she had known socially for several months, and that she knew where he lived. The victim and Officer Logan drove to Burwick's apartment, where they found him standing on the sidewalk talking to a man. The victim identified Burwick as the man who attacked her, and Officer Logan arrested him.

Before the case went to trial, Burwick's counsel filed a Notice of Intent to Rely on the defense of insanity. In its case-in-chief the State introduced evidence of defendant's behavior during the commission of the crime and of his conduct at the time of his arrest. This consisted of the victim's testimony that she was awaken at about 5:30 a.m. by a man attempting to choke her and to cover her face with a chemical soaked rag. She struggled and the man threaten, "if you don't be still and quiet, I'll kill you." Although she did not see her attacker's face, she recognized his voice as that of Burwick.

Her assailant continued to choke her and she passed out. She stated

that when she came too she was naked, her hands were tied, and Burwick sexually assaulted her. When she began to cry, Burwick "quit everything, just stopped, put his clothes back on and started apologizing." Burwick told her that "he was sorry that I had to know it was him doing this, he didn't want me to know it was him." Burwick continued to apologize and told her that he would wait if she wanted to call the police or, if she didn't want to call the police, he would turn himself in to the psychiatric ward of the hospital for treatment. She told him that she just wanted him to leave, and he did so. . . . The victim called the police. It was approximately 8:30 a.m.; the police answered the call about fifteen minutes later.

The State also called three members of the sheriff's department to testify about the circumstances of Burwick's arrest and his subsequent conduct. Officer Logan testified that about 9:00 a.m., three hours after the attack, he placed Burwick under arrest as a result of the victim's identification and read him his rights. The State asked Officer Logan to describe Burwick's apparent emotional state at the

> time of the arrest and the officer responded that "he appeared to be calm, relaxed. He apparently realized what was going on.". . . Sergeant Brown stated that, when he arrived at the scene of the arrest, he read Burwick his rights and that Burwick stated he understood these rights. Burwick and Sergeant Brown conversed for a while and according to Sergeant Brown's testimony, Burwick did not seem emotionally upset, was clean and well dressed and gave coherent responses to questions. Richard Pruitt, a homicide detective who also interviewed Burwick, testified that Burwick stated that he understood his rights, signed the rights form, appeared to understand the questions, and answered coherently and without hesitation."
>
> (App. 2-7).

The defense called Robert Russell who testified as to what he observed as a cellmate with Burwick following this incident. Burwick testified in his own behalf:

> ". . .he never denied committing the assault, but stated that he was not aware of his actions, and that his mind did not clear until about eight o'clock the morning of the assault."

After the defense rested its case, the State, with the jury absent, advised the court that on rebuttal it "intended to elicit testimony from police officers regarding the defendant's exercise of his constitutional rights in response to his assertion of insanity defense." Under the authority of Greenfield, the trial judge allowed Officer Logan and Sergeant Brown to testify fully concerning Burwick's conduct at the time of the arrest. Officer Logan stated that, after he read Burwick his rights, he asked Burwick if he would like to make a statement; Burwick replied that he did not. Sergeant Brown testified that his conversation with Burwick, which took place very soon after the arrest, ended with Burwick stating that he wanted to talk with a lawyer. The State, also in rebuttal of the insanity defense, offered testimony of Dr. Miller, a psychiatrist, who stated that, in his expert opinion, Burwick could distinguish between right and wrong and understood the nature of the offense at the time the offense was committed."

(App. 8-10).

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court in interpreting this Court's decisions in Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975) and Miranda v. Arizona, 384 U.S. 436 (1966) concluded that:

> "In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt. Accordingly, the State should not be permitted to confirm Burwick's mental state with evidence of his post-Miranda silence."

(App. 15).

The only issue before the trial court was whether Burwick was sane at the time of offense, rather than whether

Burwick committed the act for which he was charged. The negative inferences which might be drawn by a jury that a defendant is guilty of committing a criminal act are absent where, as here, an insanity defense is noticed pre-trial and used as the defense during the course of the trial. The instant exception falls outside the principles set forth in Doyle v. Ohio, supra, and United States v. Hale, and thus the Florida Supreme Court's strict construction of those decisions is erroneous. The dissent speaking through Justice Overton acknowedged the fundamental principle of constitutional law that a defendant should not be penalized for exercising his Fifth Amendment privilege but also recognize that exception exist. Citing to Fletcher v. Weir, 455 U.S. 603 (1982) the dissent noted:

"It is reasoned that evidence of silence creates an inference that the defendant is guilty of committing the criminal act and the purpose of the rule is to avoid such an inference. In the instant case, however, there is no question that the act was committed by Burwick. The only issue was the defendant's mental condition at the time of the offense. Mental competency is a distinct separate issue to which the inference of guilt by silence just does not logically or reasonably apply.

(App. 21).

I conclude that the reason for the rule, as enunciated in Doyle and Hale, is not present in the instant case. Evidence of how Burwick responded to the Miranda warnings is admissible, in my view, as long as such evidence goes solely to the issue of Burwick's competency at the time of the offense. This conclusion has support in federal jurisdictions. See, Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982) cert.den. 103 S.Ct. 1439 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir.) cert.den. 439 U.S.

> 858 (1978). I find that the majority unduly restricts the State in its presentation of a relevant, probative, rebuttal evidence to meet its burden of proving a defendant sane beyond a reasonable doubt.
>
> (App. 23-24).

A good comparison can be made with regard to this court's refusal to suppress illegally obtained evidence offered to impeach an accused who testified in his own defense. United States v. Havens, 446 U.S. 620, 626 (1980) and Harris v. New York, 401 U.S. 222 (1971). The principle expoused therein applies with equal force to the evidence which the State seeks to use generally to rebut an affirmative defense. Refusal to exclude such evidence leaves wholly intact the State's obligation to prove the defendant's guilt in its case-in-chief without relying on unlawfully obtained evidence or violating a defendant's right to remain silent. Once, however, a

defendant affirmatively presents evidence (or a defense), there is no rational bases upon which to deny the trier of fact or probative reliable evidence on the issue of guilt, or, at bar the continuing viability of Burwick's affirmative defense. There is even less justification to suppress evidence relevant to the defense of insanity. Insanity presupposes that the accused has "committed all the elements of a prescribed defense," United States v. Scott, 437 U.S. 82, 97-98 (1978). Consequently, courts have recognized the similarity between using illegally obtained evidence for the narrow purpose of impeachment and using it "not. . . as proof of its contents but only as bearing upon the insanity defense in that it was asserted to be evidence of (Burwick's) rationality" contemporaneous to the would be crime. See Barkley v. United States,

323 F.2d 804, 806 (D.C. 1963). As observed in Michigan v. Tucker, 417 U.S. 433, 450 (1974), insanity, more than any other defense, exemplifies the need, "when balancing the interest involved, (to) weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. . ."

This concept is not foreign to federal courts. As noted by the dissent in State v. Burwick, supra, in United States v. Trujillo, 578 F.2d 285 (10th Cir.) cert. den. 439 U.S. 858 (1978):

> "The agents' testimony that defendant did not want to make a statement until he consulted a lawyer was factual and not contraverted. The issue in the case, properly raised by a pre-trial notice, was the defense of insanity at the time of commission of the offense charged. The government did not

> exploit post-arrest silence. . . . Post-arrest silence may be pertinent to a claim of insanity. United States v. Julian, 10th Cir. 450 F.2d 575, 578-579; see also United States v. Coleman, 10th Cir. 501 F.2d 342, 346. In the circumstances presented, defendant's request for a lawyer and his answers to the personal identification questions disclosed understanding and awareness proper for consideration in determining his sanity. The danger of unfair prejudice is minimal and the probative value substantial. See Rule 403, Federal Rules of Evidence. The trial court properly denied the motion for mistrial because of the agents' testimony. 578 F.2d at 288.

Similarly in Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981) the court of appeals held that a trial court had properly allowed an illegally obtained tape recording to be used both "to determine the credibility of (the defendant) and his mother and on the issue of (the defendant's) sanity, but not as to whether (the defendant) had committed the crime charged."

651 F.2d at 484.

As noted by Justice Overton in his dissent "Burwick, by claiming insanity

and putting on his testimony, opened the door for the State to present this relevant, probative evidence concerning Burwick's state of mind at the time of his arrest." (App. 23). The State of Florida should not have been precluded pursuant to Doyle, Hale, and Miranda v. Arizona, from utilizing Burwick's actions as evidence to negate assertions of insanity at a time contemporaneous to the offense charged. As observed in Harris v. New York, 401 U.S. at 226 n. 61 "The shield provided by Miranda cannot be perverted into a license to use prejury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Here the shield provided by Miranda should not be used to pervert into a license to use a defense of insanity free from the risk of confrontation with prior inconsistent actions.

CONCLUSION

This court should except and reverse the Florida Supreme Court's erroneous interpretation of this court's decisions.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF FLORIDA

NO. 61,630

STATE OF FLORIDA, Petitioner,

v.

ARTHUR HAYES BURWICK, Respondent.

[December 8, 1983]

ADKINS, J.

This petition is before the Court for review of the decision of the First District Court of Appeal in Burwick v. State, 408 So.2d 722 (Fla. 1st DCA 1982), which directly conflicts with the decision of the Second District Court of Appeal in Greenfield v. State, 337 So.2d 1021

(Fla. 2d DCA 1976). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

The issue is whether the state may introduce evidence of a defendant's post-arrest conduct, including silence and the request to see an attorney after receiving Miranda (Miranda v. Arizona, 384 U.S. 436 (1966), warnings, as it relates solely to the issue of mental condition near the time of the offense when the defendant has asserted the insanity defense and the evidence is presented by the state in rebuttal. The First District Court of Appeal in Burwick held this type of evidence inadmissible, expressly disagreeing with the holding in Greenfield. We agree with the district court's decision and disapprove the decision in Greenfield.

The material facts are not in dispute and are as follows. On the morning of

May 29, 1980, the victim called the sheriff's office to report that a man had broken into her home and had sexually assaulted her. Officer Logan of the Jacksonville Sheriff's Department answered the call. The victim told Officer Logan that her attacker was Burwick, whom she had known socially for several months, and that she knew where he lived. The victim and Officer Logan drove to Burwick's apartment, where they found him standing on the sidewalk talking to a man. The victim identified Burwick as the man who attacked her, and Officer Logan arrested him.

Before the case went to trial Burwick's counsel filed a notice of intent to rely on the defense of insanity. In its case-in-chief the state introduced evidence of defendant's behavior during the commission of the

crime and of his conduct at the time of his arrest. This consisted of the victim's testimony that she was awakened at about 5:30 a.m. by a man attempting to choke her and to cover her face with a chemical-soaked rag. She struggled and the man threatened, "If you don't be still and quiet, I'll kill you." Although she could not see her attacker's face, she recognized his voice as that of Burwick.

Her assailant continued to choke her and she passed out. She stated that when she came to she was naked, her hands were tied, and Burwick sexually assaulted her. When she began to cry, Burwick "quit everything, just stopped, put his clothes back on and started apologizing." Burwick told her that "he was sorry that I had to know it was him doing this, he didn't want me

to know it was him." Burwick continued to apologize and told her that he would wait if she wanted to call the police or, if she didn't want to call the police, he would turn himself in to the psychiatric ward of the hospital for treatment. She told him that she just wanted him to leave, and he did so. After Burwick left, the victim dressed and called a neighbor, James Harris. When Mr. Harris arrived at her home, the victim told him about the attack. Mr. Harris stayed with her until she had given her children breakfast, and then he left to take her oldest child to school. After Mr. Harris left, the victim called the police. It was approximately 8:30 a.m.; the police answered the call about fifteen minutes later.

The state also called three members of the sheriff's department to testify about the circumstances of Burwick's

arrest and his subsequent conduct. Officer Logan testified that at about 9:00 a.m., three hours after the attack, he placed Burwick under arrest as a result of the victim's identification and read him his rights. The state attorney asked Officer Logan to describe Burwick's apparent emotional state at the time of the arrest and the officer responded that "he appeared to be calm, relaxed. He apparently realized what was going on." Sergeant Brown, Officer Logan's supervisor, was asked to describe Burwick's conduct when he interviewed him shortly after the arrest. Sergeant Brown stated that, when he arrived at the scene of the arrest, he read Burwick his rights and that Burwick stated he understood these rights. Burwick and Sergeant Brown conversed for a while and, according to Sergeant Brown's testimony,

Burwick did not seem emotionally upset, was clean and well-dressed and gave coherent responses to questions. Richard Pruitt, a homicide detective who also interviewed Burwick, testified that Burwick stated that he understood his rights, signed the rights form, appeared to understand the questions, and answered coherently and without hesitation.

The defense called Robert Russell, an inmate in the county jail who had shared a cell with Burwick, and Burwick himself. Mr. Russell testified that he had observed Burwick and thought that he "acts very oddly. He does crazy, disoriented things." Burwick testified in his own behalf. He stated that he had suffered from a lot of emotional distress prior to the time of the assault and that he had been drinking a great

deal. He claimed to have had a history of black-outs and to have been in a psychiatric hospital for a time. In response to questions on direct examination, Burwick stated that he remembered waking about 5:00 a.m. on May 29, feeling depressed, and being angry because his car wouldn't start. Burwick testified that he remembered getting his car started and that "the next thing I fully remember is being in the house and in the room with [the victim] and by the state, the condition she was in, I could see that something had happened. I didn't know what." He never denied committing the assault, but stated that he was not aware of his actions, and that his mind did not clear until about eight o'clock the morning of the assault.

After the defense rested its case, the state, with the jury absent, advised the court that on rebuttal it "intended to elicit testimony from police officers regarding the defendant's exercise of his constitutional rights in response to his assertion of insanity defense." Under the authority of Greenfield, the trial judge allowed Officer Logan and Sergeant Brown to testify fully concerning Burwick's conduct at the time of the arrest. Officer Logan stated that, after he read Burwick his rights, he asked Burwick if he would like to make a statement; Burwick replied that he did not. Sergeant Brown testified that his conversation with Burwick, which took place very soon after the arrest, ended with Burwick stating that he wanted to talk with a lawyer. The state, also in rebuttal of the insanity

defense, offered the testimony of Dr. Miller, a psychiatrist, who stated that, in his expert opinion, Burwick could distinguish between right and wrong and understood the nature of the offense at the time the offense was committed.

On appeal, the First District Court of Appeal reversed the convictions and remanded for a new trial upon finding that the trial judge committed reversible error in allowing the state to rebut the insanity defense by introducing testimony describing Burwick's refusal to make a statement and request for an attorney. The district court expressly rejected the Second District Court's Greenfield decision.

We fully recognize that it is a fundamental principle of our constitutional law that a defendant cannot be penalized for exercising his fifth

amendment privilege to refuse to communicate to the authorities information which would implicate him in the commission of a criminal offense. Miranda; Clark v. State, 363 So.2d 331 (Fla. 1978); Bennett v. State, 316 So.2d 41 (Fla. 1975). The reason for the rule holding inadmissible at trial evidence of the post-arrest silence and request for counsel of a defendant who has been advised of his Miranda rights is that the evidence creates an inference that the defendant is guilty of committing the criminal act. There is no dispute that it is reversible error for the prosecution to attempt to impeach a defendant's alibi testimony by asking on cross-examination why he remained silent at the time of his arrest. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975).

The Greenfield decision permits the state to rebut the defense of insanity with evidence, taken during custodial interrogation, of a defendant's desire to remain silent and his request for an attorney. That decision is based largely on the unfounded assumption that post-arrest, post-Miranda silence is probative of sanity. Inasmuch as this position cannot be reconciled with the principles of law announced in United States v. Hale, 422 U.S. 171 (1975), and Doyle v. Ohio, 426 U.S. 610 (1976), we disagree.

In Hale, the United States Supreme Court weighed the probative value of post-arrest, post-Miranda silence and in so doing observed:

> At the time of arrest and during custodial interrogation, innocent and guilty alike--perhaps particularly the innocent --may find the situation so intimidating that they may choose

> to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence.

422 U.S. at 177 (footnote omitted). The Court also recognized that an arrestee, who had just been informed of his Miranda rights and was particularly aware of his right to remain silent, could reasonably infer that his silence would not be used against him. With this in mind the Court continued as follows:

> [F]ailure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct.

Id. at 177. In sum, the Supreme Court found post-arrest, post-Miranda silence inherently ambiguous and thus incapable of serving a legitimate probative purpose.

Regardless of the nature of the defense raised, the evidentiary doctrine in Hale remains intact. Post-arrest, post-Miranda silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence. 422 U.S. at 180. Contrary to what Greenfield intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition

is brought into issue. The same evidentiary problems addressed by the Supreme Court in Hale are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent. In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt. Accordingly, the state should not be permitted to confirm Burwick's mental state with evidence of his post-Miranda silence.

With equal dissatisfaction we reflect upon the constitutional infirmities which plague the Greenfield decision. Burwick was arrested, informed that he had a right to remain silent, that anything he said might be used against him, and that he had a right to an attorney if he so desired. See Miranda v. Arizona. Above all, he was implicitly assured that he would not be penalized if he should choose to exercise these Miranda rights. Doyle v. Ohio. The decision in Greenfield capriciously disavows those governmental assurances contained within the Miranda warning and permits the state to go back on its word. It is fundamentally unfair for the state to lure Burwick into remaining silent then impeach the man with this very same silence. To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the fourteenth amendment and

article I, section 9, of the Florida Constitution. See Doyle v. Ohio; see also United States v. Hale, 422 U.S. 171, 182 (White, J., Concurring).

Our decision today is thoroughly consistent with our decision in Parkin v. State, 238 So.2d 817 (Fla. 1970). In that case we held that where a defendant in a criminal case serves notice that she will rely upon a defense of insanity, her rights to freedom from self-incrimination are not invaded when the court requires her to submit to psychiatric examination by court appointed psychiatrists. Id. at 822. We carefully limited the scope of that decision in order to safeguard the privilege against self-incrimination from just the sort of situation we face in the instant case. We stated:

> In other words, the Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview....

Id. at 820. In the instant case, the prosecution could have elicited testimony which would demonstrate the fact that the defendant carried on a rational and coherent conversation without specifically revealing that he chose to remain silent and assert his constitutional rights.

Accordingly, we approve the decision of the First District Court of Appeal and disapprove the decision of the Second District in Greenfield v. State.

It is so ordered.

BOYD, McDONALD and EHRLICH, JJ., Concur
OVERTON, J., Dissents with an opinion, with which ALDERMAN, C.J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., dissenting.

I dissent. In my view, when a defendant has asserted the insanity defense the state should be able to introduce evidence of a defendant's post-arrest conduct, including his silence after receiving Miranda warnings, so long as such evidence relates solely to the issue of the defendant's mental condition near the time of the offense and is presented by the state in rebuttal to mental condition evidence presented by the defendant. In this case, there was no issue concerning whether the appellant committed the act for which he was charged. The only real issue was whether the appellant was sane at the time of the offense.

I recognize that it is a fundamental principle of constitutional law that a defendant cannot be penalized for exercising his fifth amendment privilege to refuse to communicate to the authorities information which would implicate him in the commission of a criminal offense. Miranda v. Arizona, 384 U.S. 436 (1966); Clark v. State, 363 So.2d 331 (Fla. 1978); Bennett v. State, 316 So.2d 41 (Fla. 1975). Further, I agree that it is reversible error for the prosecution to attempt to impeach a defendant's alibi testimony by asking the defendant on cross examination why he remained silent at the time of his arrest. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975). There are exceptions, however, and one is that a prosecutor may use a defendant's

post-arrest silence to impeach exculpatory testimony when there was no evidence that the defendant had received Miranda warnings. Fletcher v. Weir, 455 U.S. 603 (1982). It is reasoned that evidence of silence creates an inference that the defendant is guilty of committing the criminal act and the purpose of the rule is to avoid such an inference. In the instant case, however, there is no question that the act was committed by Burwick. The only issue was the defendant's mental condition at the time of the offense. Mental competency is a distinct separate issue to which the inference of guilt by silence just does not logically or reasonably apply.

The appellant, Burwick, claimed as his sole defense that he was insane at the time he assaulted the victim and he offered testimony tending to place

his sanity in doubt. In Florida the defendant is presumed sane, but, once the defendant introduces evidence indicating insanity, the state must rebut the insanity defense by proving the defendant sane beyond a reasonable doubt. Holmes v. State, 374 So.2d 944 948 (Fla. 1979), cert. denied, 446 U.S. 913 (1980); Parkin v. State, 238 So. 2d 817 (Fla. 1970). The state presented evidence of Burwick's conduct at the time of his arrest, including his acknowledgment of his rights and his desire to remain silent, in rebuttal to the (1) testimony of an inmate in the county jail who shared a cell with Burwick and testified that Burwick "acts very oddly" and "does crazy, disoriented things," and (2) Burwick's testimony that his mind was not clear at the time of the offense. The

state's rebuttal testimony was intended to show Burwick's mental condition at the time of his arrest which was between the time of the offense and the time when the cellmate made his observation. Burwick, by claiming insanity and putting on this testimony, opened the door for the state to present this relevant, probative evidence concerning Burwick's state of mind at the time of his arrest. I conclude that the reason for the rule, as enunciated in Doyle and Hale, is not present in the instant case. Evidence of how Burwick responded to the Miranda warnings is admissible, in my view, as long as such evidence goes solely to the issue of Burwick's competency at the time of the offense. This conclusion has support in federal jurisdictions. See Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert.

denied, 103 S. Ct. 1439 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir.), cert. denied, 439 U.S. 858 (1978). I find that the majority unduly restricts the state in its presentation of relevant, probative, rebuttal evidence to meet its burden of proving a defendant sane beyond a reasonable doubt.

For the reasons expressed, I would quash the decision of the district court in the instant case.

ALDERMAN, C.J., Concurs

Arthur Hayes BURWICK, Appellant

v.

STATE of Florida, Appellee.

No. YY-293.

District Court of Appeal of Florida, First District.

Jan. 12, 1982

McCORD, Judge.

Burwick appeals his conviction and sentences on charges of sexual battery and burglary with assault. We reverse and remand.

Burwick contends that the trial judge committed reversible error by admitting testimony by two policemen who stated they had asked him shortly after the arrest "if he would like to make a statement... and he said he did not" and that a police interview had ended "when the defendant said that he wanted to talk to a lawyer." We agree.

See Marshall v. State, 393 So.2d 584 (Fla. 1st DCA 1981), and cases cited therein.

The trial judge admitted this evidence by relying on Greenfield v. State, 337 So.2d 1021 (Fla. 2d DCA 1976); remanded without opinion, 364 So.2d 885 (Fla. 1978), in which the second district held that a prosecutor in closing argument may comment on a defendant's request for an attorney and his desire to remain silent because they indicate he was not insane. As in Greenfield, the appellant here pled not guilty by reason of insanity.

We disagree with the ruling in Greenfield that when the defense of insanity is raised, evidence of the defendant's exercise of his right to remain silent thereby becomes admissible. The Greenfield opinion cited as authority

Parkin v. State, 238 So.2d 817 (Fla. 1970), quoting, and relying on, the broad language that "if the statutes and case law permit a defendant the privilege of raising [an insanity defense], he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination." That statement was made, however, only in the context of the circumstances presented in that case. It did not involve, as here, the admissibility of testimony of the defendant's exercise of his right to remain silent. There the question was whether a defendant who pleads insanity could then exercise her right to remain silent and refuse to answer a court-appointed doctor's questions regarding her mental status or medical history. This is unrelated to the question presented here.

Greenfield also referred to Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), to support its position that the protection required in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), should not preclude the state from introducing relevant evidence to rebut an insanity defense. However, Harris and its forebearers were concerned with defendants who commit perjury and then call upon their constitutional rights in an attempt to exclude proof of that perjury.[1] We have no such situation here.

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[1] "The shield provided by Miranda cannot be perverted into a license to use perjury..." 401 U.S. at 226, 91 S.Ct. at 646 (otherwise inadmissible testimonial evidence may be introduced for impeachment purposes). Cf. Walder v. U.S., 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed 503 (1954) (otherwise inadmissible physical evidence may be used for impeachment). And cf.

Burwick is also correct that he should have been allowed to ask a state witness on cross examination if he had been involved in a romantic relationship with the victim. Unfortunately, the judge did not permit the witness to respond to the question during a defense proffer, so neither we, nor the trial court, can determine whether the answer would include evidence of specific instances of sexual activity by the victim, excluded by Section 794.022(2), Florida Statutes (1979).

(Footnote 1 continued) Dennis v. U.S., 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) (person who furnished false information to the government cannot defend on the ground that the law requiring the information was invalid) with United States v. Knox, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1979) (person who furnished false information to the government cannot defend on the ground that the law requiring the information violated his right against self-incrimination).

The question as asked goes to the bias and credibility of the witness and is a proper question. The answer, however, could be inadmissible as a violation of the statute.

We find no merit to Burwick's contention that there was a discovery violation; the trial judge comported with the requirements of Richardson v. State, 246 So.2d 771 (Fla. 1971). We also find that the judge did not err in entering judgment and sentence on both charges; the state's pleadings and proof were sufficient to establish two separate crimes. Finally, we reject Burwick's attack on the constitutionality of Section 947.16. See Arnett v. State, 397 So.2d 330 (Fla. 1st DCA 1981).

Accordingly, this cause is reversed and remanded for a new trial.

LARRY G. SMITH and SHIVERS, J.J., concur.

David Wayne GREENFIELD, Appellant,

v.

STATE of Florida, Appellee.

No. 75-1731

District Court of Appeal of Florida,
Second District

Sept. 24, 1976.

Rehearing Denied Oct. 25, 1976.

McNULTY, Chief Judge.

On this direct appeal appellant Greenfield assails his conviction of sexual battery. The sole issue on appeal relates to the denial of a motion for new trial predicated on the ground that he prosecutor prejudicially commented in summation on appellant's exercise of his right to remain silent at the giving of his Miranda rights at the time of his arrest. We affirm.

Most significantly, in this case, appellant pleaded not guilty by reason of insanity. Accordingly, there was no real dispute as to the essential objective facts herein. They are that the prosecutrix, having sunned herself on a local beach in Sarasota in the late morning or early afternoon on the day of the offense, was returning to her car because of the threat of rain. It was necessary that she pass through a wooded area when she was accosted by appellant and dragged to a more secluded ares of the beach where the sexual assault occurred. Upon her release by appellant the prosecutrix drove immeidately to the police station and reported the incident, describing appellant. A police officer promptly returned to the scene of the assault and in the vicinity thereof spotted appellant as one fitting in considerable detail the description given by the prose-

cutrix. He arrested appellant and read him his Miranda rights.

The officer testified that he explained these rights, that appellant thanked him for explaining them, and that appellant said he understood them and did not wish to speak to the officer until he spoke to an attorney. Shortly thereafter at the police station appellant was again interviewed by other officers, again reminded of his rights and again he reiterated that he did not wish to speak to the officers, that he wanted to speak to an attorney. In fact, he was permitted to and did call an attorney. No objection was made to the introduction of this evidence relating to the giving of the Miranda rights and to Appellant's responses thereto.

During closing arguments, however, the prosecutor made the following comments:

"But let's go from what she stated. Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throes of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of

his act. Even down-as going down [in] the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said-and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley-he's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.'

> 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant.'

At this point, counsel for defendant strenuously objected on the basis that such comments were improper references to appel-

lant's insistence on his Fifth Amendment right to silence. We cannot agree.

While we do agree that, at least in the face of an objection, testimony or prosecutorial comment relating to a defendant's insistence on his right to remain silent generally constitutes reversible error,[1] we are of the view that under the circumstances of this case the general rule ought not apply.

When insanity is raised by plea of a defense, an evidence thereof is forthcoming prima facie sufficient to raise a reasonable doubt, the state no longer can travel

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[1] Shannon v. State, (Fla. 1976), 335 So.2d 5 (Opinion filed June 30, 1976); Bennett v. State, (Fla. 1975), 316 So.2d 41; Clark v. State, (Fla. App.2d 1976) 336 So.2d 468 (Opinion filed July 28, 1976).

on the presumption of sanity; it must establish sanity beyond a reasonable doubt as with every element of the offense charged.[2]

Certainly, evidence of the conduct and apparent state of mind and awareness of an accused, particularly where, as here, it is connected closely in point of time to the crime charged, is relevant to this issue; and it would be manifestly unfair to permit a defendant prima facie to establish a defense and then preclude the state from meeting it by barring relevant evidence to the contrary because of the "Miranda" rationale.[3]

---

[2] See, e.g., Farrell v. State, (Fla. 1958), 101 So.2d 130; Byrd v. State, (Fla.App.2d, 1965), 178 So.2d 886.

[3] Cf. Harris v. New York, (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1.

Here, for example, the evidence relied upon by the state was perhaps the most competent evidence on appellant's mental capacity at the time of the offense available, being so closely connected to the res gestae. It was neither unfair to introduce it[4] nor improper to comment upon it in summation; and, though considered in a somewhat different context (i.3., with respect to defendant's right to silence during a psychiatric evaluation order by the court), we concur with the observations of Mr. Justice Adkins in Parkin v. State:[5]

---

[4] No issue is made herein about the postural sequence in which the evidence came in. That is, the evidence came in during the state's case in chief before there was any evidence from the appellant as to his insanity. But no objection was made at the time. So, by objecting to prosecutorial comments thereon during summation, the appellant is in no different position that he would have been in had such evidence been introducted in rebuttal, when it would have been, as we hold here, improper.

[5] (Fla. 1970), 238 So.2d 817.

> "When the plea of not guilty by reason of insanity was entered, it was done so with knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead this defense, and if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination..."

In view whereof, the judgment and sentence appealed from should be, and they are hereby, affirmed.

HOBSON, J., concurs

GRIMES, J., dissents with opinion.

GRIMES, Judge (dissenting).

There is considerable logic in Judge McNulty's opinion. Yet, it is an appreciable step beyond Harris v. New York in which the U.S. Supreme Court held that when a defendant took the stand he could be cross-

examined on inconsistent statements he had given to the police in violation of his Miranda rights. That decision was based upon the premise that a person should not be entitled to commit perjury and at the same time hide behind the constitutional right to remain silent.

Here, there is no question of perjury because the appellant did not take the stand, and I cannot equate interposing a defense of insanity with the giving of perjured testimony. The testimony of Officer Pilafant, had it been objected to, and the comments of the prosecutor in closing argument, which were objected to, would require reversal under Bennett v. State, supra. The fact that this evidence was probative on the sanity issue cannot deprive appellant of his constitutional protections.

Moreover, had the state been conscious of the possibility that Pilafant's testimony might result in a violation of Miranda principles, the problem could have been avoided with a minimum of prejudice to the state's case. The questions an answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent.

In view of the present posture of the law on this subject, I must respectfully dissent.

MAR 9 1984

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, NINETEEN HUNDRED AND EIGHTY-THREE

STATE OF FLORIDA,

Petitioner,

-v-

ARTHUR HAYES BURWICK,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Florida

BRIEF OF RESPONDENT IN OPPOSITION

MICHAEL E. ALLEN
PUBLIC DEFENDER

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

COUNSEL FOR RESPONDENT

Post Office Box 671
Tallahassee, Florida 32302

QUESTION PRESENTED

WHETHER THE EXERCISE OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND TO HAVE THE ASSISTANCE OF COUNSEL PURSUANT TO MIRANDA V. ARIZONA, 384 U.S. 436 (1966), CLOSELY CONNECTED IN TIME TO THE OFFENSE, BEARS A SUFFICIENT RELATIONSHIP TO THE ISSUE OF SANITY AT THE TIME OF THE OFFENSE TO OVERCOME ANY NEGATIVE INFERENCES WHICH MIGHT BE DRAWN BY A JURY AND PERMIT THE ADMISSION OF THE DEFENDANT'S ELECTION ON REBUTTAL TO REFUTE AN INSANITY DEFENSE.

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PRELIMINARY STATEMENT

References to Petitioner's Brief on Jurisdiction will be by use of the following abbreviation: Pet.Br.- followed by the appropriate page number. References to Petitioner's Appendix will be by use of the following: Pet.App.- followed by the appropriate page number.

OPINIONS BELOW

Petitioner's allegations designating the opinions below are correct.

JURISDICTION

Petitioner's jurisdictional allegations are accepted.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts the constitutional and statutory provisions involved as set forth by petitioner (Pet.Br.3-4).

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by petitioner (Pet.Br. 5-12), with the addition that the opinion of the Florida Supreme Court is based on state, as well as federal, constitutional provisions.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to review and reverse the opinion of the Florida Supreme Court in State v. Burwick, __So.2d__ (Fla. 1983) 1983 FLW 480, as an erroneous interpretation of this Court's previous decisions regarding the admissibility of evidence at trial which reflects that the defendant requested an attorney and remained silent following his arrest and receipt of the warnings enunciated in Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner contends that the facts of this case present an exception to the general ban on the admission of such evidence similar in nature to those created

by this Court in United States v. Havens, 446 U.S. 620 (1980) and Harris v. New York, 401 U.S. 222 (1971). Petitioner completely overlooks the fact that Havens and Harris simply did not concern the use of post-arrest silence, but rather dealt with the use of post-arrest statements obtained in violation of Miranda to impeach a defendant who gave inconsistent statements on the stand at trial. This Court held that the Miranda rule of exclusion of illegally obtained statements could not be "perverted into a license to use perjury by way of a defense." Harris, 401 U.S. at 226. This significant difference between the use of post-arrest, post-Miranda statements, and the use of post-arrest, post-Miranda silence belies petitioner's assertion that the opinion of the Florida Supreme Court is in conflict with this Court's prior decisions.

The fact that Burwick's state of mind was placed in issue by his insanity defense does not obviate the fact that post-arrest, post-Miranda silence is so ambiguous that its probative value on any issue has been rejected, as a matter of law, by this Court. In United States v. Hale, 422 U.S. 171 (1975), this Court held that post-arrest silence is inherently ambiguous because such conduct may constitute either a tacit admission of guilt or a lawful assertion of a Fifth or Sixth Amendment right. In so holding, this Court stated:

> At the time of arrest and during custodial interrogation, innocent and guilty alike - perhaps particularly the innocent - may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657, 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.
>
> Hale, 422 U.S. at 177 (footnote omitted).

The Florida Supreme Court, in Burwick, reiterated this logic as follows:

> Contrary to what Greenfield [337 So.2d 1321 (Fla. 2d DCA 1976)] intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue. The same evidentiary problems addressed by the Supreme Court in Hale are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent. In sum, just what induces post arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt.
>
> Pet.App.-14-15.

Similarly, in Doyle v. Ohio, 426 U.S. 610 (1976), this Court, as in Hale, held that references to a defendant's post-arrest, post-Miranda silence may not be made in rebuttal of a defense of alibi. There, this Court held that the use of such evidence is a violation of due process:

> While it is true that the Miranda warnings constitute no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.
>
> Doyle, 426 U.S. at 618.

Recently, this Court reaffirmed its Hale and Doyle pronouncements. In Fletcher v. Weir, 455 U.S. 603 (1982), this Court held that evidence of post-arrest silence could be used to rebut a defense of self defense where the silence was not preceded by the giving of Miranda warnings. This Court stated:

> In the absence of the sort of affirmative assurance embodied in the Miranda warnings, we do not believe that it violates due process of law for a state to permit cross examination as to post arrest silence when a defendant chooses to take the stand.
>
> Fletcher, 455 U.S. at 607.

This Court also outlined its recent rulings on the subject in support of the holding:

> In Jenkins v. Anderson, 447 U.S. 231, 239 (1980), a case dealing with pre-arrest silence, we said:
>
> > "Common law traditionally has allowed witnesses to be impeached by their previous failure to state of fact and circumstances in which the fact naturally would have been asserted. 3 A J. Wigmore, Evidence, Section 1042, P.1056 (Chadbourn Rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative."
>
> In Jenkins, as in other post-Doyle cases, we have consistently explained Doyle as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him. In Roberts v. United States, 445 U.S. 552, 561 (1980), we observed that the post conviction, presentencing silence of the defendant did not resemble "post-arrest silence that may be induced by the assurances contained in Miranda warnings." In Jenkins, we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his Miranda warnings, commenting that no governmental action induced the defendant to remain silent before his arrest. 447 U.S. at 239-240. Finally, in Anderson v. Charles, 447 U.S. 404, 407-408 (1980), we explained that use of silence for impeachment was fundamentally unfair in Doyle because "Miranda warnings inform a person of his right to remain silent and assure him, at least implicitly that his silence would not be used against him.... Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.
>
> Fletcher, 455 U.S. at 606.

Thus, it is clear that this Court bans the use of post-arrest, post-Miranda silence because such silence is inherently ambiguous and susceptible of no fair inference, and because it is induced by the warnings containing the implicit assurance that the silence will not be used against the defendant at trial. Although it is true that this Court has created an exception to this rule when a defendant takes the stand and testifies in a manner contradicted by illegally obtained statements, there is no basis for petitioner's argument that government induced silence is relevant

in rebuttal of an insanity defense, when this Court has held it inadmissible in rebuttal of other affirmative defenses.

As the Fifth Circuit Court of Appeals has stated in United States v. Henderson, 565 F.2d 900 (5th Cir. 1978), the Fifth Amendment "is not an if-but-or sometimes partial privilege, it is a complete and absolute right." Henderson, 565 F.2d at 903. It is in recognition of the "aura of guilt [which] is popularly associated with an accused's exercise of the right to remain silent" that the courts have adhered to the principle first enunciated in Miranda. Henderson, 565 F.2d at 905. Historically, the Florida Supreme Court has also strictly protected the right to remain silent established in the state and federal constitutions. The decision of the Florida Supreme Court in Burwick is an application of principles previously pronounced as a matter of state law. In the opinion, the court cites to its previous opinions in Clark v. State, 363 So.2d 331 (Fla. 1978), and Bennett v. State, 316 So.2d 41 (Fla. 1975) (Pet.App.-11). These cases, as well as many others not cited by the court, hold that any reference in the jury's presence to the defendant's assertion of the right to decline to answer police questioning is reversible error where properly preserved. See, Simpson v. State, 418 So.2d 984 (Fla. 1982); Willensky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976); Simmons v. State, 139 Fla. 645, 190 So. 756 (Fla. 1939).

By adhering to its own prior pronouncements, the Florida Supreme Court has not erroneously departed from this Court's interpretation of the Fifth Amendment to the United States Constitution, as argued above. However, should this Court consider the Burwick ruling to be a substantial departure from its prior pronouncements on the use of post-arrest, post-Miranda silence at trial, respondent contends that the opinion is a valid exercise of the Florida Supreme Court's prerogative to interpret the state constitution in a more restrictive manner than this Court interprets the federal constitution. See,

Manson v. Brathwaite, 432 U.S. 98 (1977) (Marshall, J.,dissenting); Oregon v. Mathiason, 429 U.S. 492 (1977) (Marshall, J., dissenting). The Florida Supreme Court held in Burwick that the state constitutional due process clause is violated by "permit[ting] the state to benefit from the fruits of its own deceptions" which arise when its agents "lure [the defendant] into remaining silent" and later "impeach the man with this very same silence." (Pet.App.-16). Thus, the opinion of the Florida Supreme Court, as an interpretation of Article I, Section 9 of the Florida Constitution (Pet.Br.-4) and a resolution of conflict within the state appellate courts on the state constitutional issue, is a valid exercise of state court jurisdiction on an independent and adequate state ground. Consequently, certiorari review would be inappropriate. See, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

CONCLUSION

Based on the foregoing arguments and authorities, this Court should decline to exercise its discretionary jurisdiction because the opinion of the Florida Supreme Court is not in conflict with the prior pronouncements of this Court on the question presented, and it is a valid interpretation of state constitutional provisions decided on independent and adequate state grounds.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Ms. Carolyn Snurkowski, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128-1789, this 2 day of March, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

NO. 83-1316

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

STATE OF FLORIDA,

Petitioner,

vs.

ARTHUR HAYES BURWICK,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

ARTHUR HAYES BURWICK, respondent in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit of insolvency has been sent to respondent, who is in custody, with directions to execute it immediately, and send it to this Court. The affidavit sets forth the fact that respondent is indigent and unable to pay or give security for the fee and costs attendant to this proceeding.

2. Respondent was adjudged insolvent in the Circuit Court of Duval County, Florida, and had court appointed counsel; and he was again adjudged insolvent for appellate purposes to the First District Court of Appeal and Supreme Court of the State of Florida, and was represented there by appointed counsel.

WHEREFORE, upon receipt of respondent's affidavit, it is respectfully requested that respondent be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

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Second Judicial Circuit
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(904) 488-2458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Arthur Hayes Burwick, c/o Duval County Jail, Post Office Box 779, Jacksonville, Florida, 32202, Honorable Sid White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and to Ms. Carolyn Snurkowski, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128-1789, this 7 day of March, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER